IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

LEONARD B. BOUDIN,
Attorney for Petitioner,
25 Broad Street,
New York 5, New York.

VICTOR RABINOWITZ,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

Petitioner, William Ludwig Ullmann respectfully petitions for a rehearing in this matter decided on March 26, 1956. In support of the petition, petitioner respectfully shows and alleges:

I

The Court should reconsider its holding that the District Court has no discretion to deny an order directing response, once application has been made by the United States Attorney with the approval of the Attorney General. The holding rests primarily on a desire to avoid the supposed serious constitutional question of whether the Court's exercise of discretion would be a non-judicial function. There are, however, two reasons why no such dilemma is posed and why discretion should be held to exist.

A. The situation involved here is enforcement of a demand for information by a grand jury. The grand jury is the arm of the court, and unquestionably supervision and control of the grand jury is a judicial function. As this Court has said with respect to grand jury investigations:

> "Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them." Hale v. Henkel, 201 U. S. 43, 65.

In the ordinary case, the District Court has and does exercise its discretion in determining whether to enforce a particular demand by the grand jury. Indeed, such a course is obviously necessary to prevent oppression and abuse of the court's processes. There is no reason, therefore, why the court cannot continue to exercise its discretion in a case arising under the statute, as part of its traditional judicial function of supervision and control of the grand jury.

The District Court, in this case, expressly refused to exercise this discretion although presented with charges and evidence of such oppression and abuse. It even denied petitioner's request that it examine the grand jury minutes to determine whether the grand jury was making a bona fide investigation into crime (S. M. 76).* Such an act of abnegation was, of course, not involved in or decided by *Brown* v. *Walker*, 161 U. S. 591. Indeed, as indicated above, it was explicitly repudiated in the later immunity act case of *Hale* v. *Henkel*, *supra*.

The Court's construction and enforcement of the statute removes from the District Court, *pro tanto*, its historic control over the grand jury, and thus curtails a traditional judicial function. And it leaves unchecked the very real possibility of oppressive use of the grand jury and the court's

* S. M. refers to the stenographic record of the hearing before Judge Weinfeld which is on file in this Court.

processes. No such intention should be ascribed to Congress in the absence of a clear legislative declaration. *Gulf Refining Co. v. Ickes*, 321 U. S. 321.

B. Even if the discretion under the statute is vested in the prosecutors, nevertheless, judicial review is available to determine whether the executive arm has, in the particular case abused its discretion. Review for abuse of administrative discretion in actions vitally affecting individual rights is unquestionably a judicial function. For example, judicial review is accorded to determine whether there has been an abuse of discretionary authority to suspend deportation (*U. S. ex rel. Accardi v. Shaughnessy*, 347 U. S. 260; *Caddeo v. Brownell*, 92 App. D. C. 89, 202 F. 2d 897; *Lim Fong v. Brownell*, 94 App. D. C. 323, 215 F. 2d 683; *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999) or to deny a passport (*Schachtman v. Dulles*, 225 F. 2d 938). See cases cited, Petitioner's Reply Brief, p. 2).

And even if it is not a judicial function to determine whether the witness should or should not have immunity, it is a judicial function to decide not to punish a witness who was offered immunity in an abuse of administrative discretion or for wrongful purposes.

The granting of the statutory immunity obviously visits serious consequences on the witness and vitally affects the administration of justice. It lends itself to serious abuse on a large scale, permitting a prosecutor to substitute political for relevant considerations, and to force witnesses who have no knowledge of acts dangerous to security but who have unpopular views or affiliations to choose between imprisonment for contempt, imprisonment on contrived perjury convictions, and becoming political informers. The record in this very case demonstrates the existence of such a situation. Nor does petitioner stand alone in his subjection to unrestrained executive power. This Court's decision may be a Pandora's box of subpoenas for thousands of citizens on a scale reminiscent of the notorious Palmer

raids directed against aliens. Surely the Court has too lightly assumed that Congress intended to place such unlimited power in the hands of the prosecutor, and that it meant to permit him to misuse the inquisitorial power of the grand jury and the invoked assistance of the courts, all without the slightest safeguard of judicial review.

At the very least, a court retains the authority to determine whether in any particular case the prosecuting authorities have abused their discretion in granting immunity and acted arbitrarily and unfairly. In the present case, the petitioner alleged that this was the situation and filed an affidavit setting out facts to support that conclusion (R. 7-22). The Attorney General did not dispute these facts but argued only that his discretion was not reviewable by the courts. The trial court agreed with the Attorney General and thus failed to examine the facts to determine whether or not in this particular case the Attorney General had acted arbitrarily and abused his discretion (R. 43). Its failure to do so requires that the case be reviewed with directions for the trial court to examine the facts and determine on the record whether or not in this particular case there has been an abuse of discretion by the prosecuting authorities.

II

The Court, in its opinion, stated that it would not discuss "petitioner's argument, relying on the First Amendment, that inquiry into his political membership and associations is unconstitutional" (Opinion, p. 17, fn. 15). This was based upon the statement that petitioner relied exclusively upon the Fifth Amendment in the contempt proceedings. This ruling was erroneous.

A. Petitioner expressly relied upon the First Amendment in objecting to certain questions upon the original proceedings to compel his testimony (R. 43-44). Once having been asserted in those proceedings and overruled, its

explicit reassertion before the grand jury or the contempt proceedings was unnecessary. It should also be noted that the First Amendment issue was argued and briefed by both parties in the court below and in this Court. The Court is in error if it concludes that the remarks of counsel were intended as a waiver of any rights. The Court has overlooked counsel's statement to Judge Murphy: "The grounds of the opposition which we press are summarized by Judge Weinfeld" (R. 50). It was recognized by counsel and court that Judge Weinfeld's decision was the law of the case and that as Judge Murphy said: "The only thing left for me then is to make a finding of contempt" (R. 50).

B. The Court seems to treat the First Amendment like the Fifth in supposing that it must be expressly invoked to justify a refusal. Unlike the Fifth Amendment, objections on First Amendment grounds are not waived by the failure to set them forth expressly. This is because the assertion of rights under the Fifth Amendment does not constitute a challenge to the power of the tribunal to ask the questions, but rests upon only a right to refuse to answer, even if the power to ask exists. But objections on First Amendment grounds, as with objections to relevancy, go to the power of the tribunal to ask the question, and can be relied upon whenever there is a general challenge to the power of the tribunal by a refusal to answer. Cf. *Sinclair v. United States*, 279 U. S. 263; *Bowers v. United States*, 202 F. 2d 447.

It may be that petitioner will wish to purge himself of contempt by testifying on such matters as espionage while still declining to answer questions concerning political membership and association on the ground of the First Amendment. But he should be permitted—if he so chooses—to yield to the grant of immunity without giving up the fundamental rights embodied in the First Amendment. However, such a course will be foreclosed to him unless the Court has decided that issue in his favor. That the issue

is a substantial one, never squarely decided by the Court, as indicated by its grant of certiorari in *Emspak v. United States*, 348 U. S. 809, judgment reversed, 349 U. S. 190, on other grounds.

It is respectfully submitted that the Court should grant reargument on this point in order to determine whether the petitioner can purge himself of contempt although continuing to refuse to answer questions protected by the First Amendment.

III

The Court has placed the petitioner and, indeed, all other American citizens in limbo with its statement that petitioner "has, of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature" (Slip opinion, p. 9). For the Court has not told us which of the sanctions discussed in its opinion are regarded by it as "criminal in nature" and hence as no longer to be invoked against petitioner if he purges himself of contempt. Are we to understand that the petitioner, once he has answered the questions put by the grand jury and regardless of his answers, may be employed in defense facilities, be eligible for a passport, not criminally liable after he applies for one, and avoid both registration and internment under the Internal Security Act of 1950 in the event that the latter Act is upheld by this Court in the case now pending?

These are most serious questions deeply affecting petitioner as a citizen and as a business man. The Court of Appeals, under *Cobbledick v. United States*, 309 U. S. 323, held that petitioner would not be able to appeal from the order of Judge Weinfeld directing him to answer the questions. He has now been placed in great doubt and jeopardy because of this Court's unwillingness or inability to state which disabilities remain and which disappear. Petitioner is entitled to be told by this Court whether the sanctions

to which he called its attention as being within the protection of the Fifth Amendment, would become inoperative if he purges himself.

We are not seeking a theoretical statement by the Court as to petitioner's rights. Petitioner, as a litigant in peril of imprisonment and as a citizen who faces other serious sanctions, is entitled to know what this Court meant when it decided that petitioner has the protection of the Fifth Amendment, and what the scope of that protection is, should he purge himself.

IV

The affirmance of the judgment below, which includes the right to purge, creates a substantial problem with respect to the second part of the order directing testimony. The order provides that the petitioner "is instructed to answer the questions propounded to him before the Grand Jury *and* to testify and produce evidence with respect to such matters under inquiry before said Grand Jury" (italics added) (R. 46).

The immunity power is so drastic and the right to purge so important that the order to testify should be limited to the particular questions propounded rather than to give the United States Attorney *carte blanche* to imprison petitioner by asking new questions, never submitted for court approval, as to that amorphous subject, "matters under inquiry before said Grand Jury" (R. 46).

Indeed, under the narrowest view of the function of the District Court under the statute, that function necessarily must include a decision as to what particular questions come within the scope of the statute. It is clear that under this Court's decision, petitioner is required to answer the specific questions which formed the basis of the contempt judgment. However, the order of Judge Weinfeld also directed petitioner to answer all other questions without

specification. True, in a technical sense he has committed contempt only in refusing to answer the questions put to him by the grand jury (see *Wong Gim Ying* v. *United States*, App. D. C., No. 12893, decided March 29, 1956). But in a real sense he stands in peril of further citation for contempt if he fails to answer any questions put in the course of the grand jury's investigation.

Petitioner is entitled to a clear direction as to the specific questions he must answer in order to satisfy the judgment of the court. This can be done either by a clarification of the judgment by this Court, or by a remand to the District Court with direction to set out the specific questions which the petitioner is obligated to answer in order to purge himself of contempt. Thereafter, he must have the right to a judicial ruling on any contested question connected with a grant of immunity.

Respectfully submitted,

LEONARD B. BOUDIN,
Attorney for Petitioner,
25 Broad Street,
New York 5, N. Y.

VICTOR RABINOWITZ,
of Counsel.

Certificate of Counsel

I, LEONARD B. BOUDIN, do hereby certify that I am counsel for the petitioner herein and that this petition for rehearing is presented in good faith and not for delay.

LEONARD B. BOUDIN.

April 17, 1956.